89-690

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEO HURWITZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA and
THE CENTRAL INTELLIGENCE AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendants are immune from liability under the Federal Tort claims Act, 28 U.S.C. §1346 (b) (1982) for opening, reading and disseminating a sealed letter duly posted for delivery?

2. Whether plaintiff has the protection, with respect to his first-class sealed mail, under the United States Constitution, Article IV, the New York State Constitution, Article 1, §12 and 39 U.S.C.A. §4057?

3. Whether plaintiff's right of privacy is invaded under 39 Penal Law §250.25 of the State of New York against unreasonable search and seizure?

4. Whether a civil action lies against defendants for the deprivation of plaintiff's right to the secrecy and security of his first-class mail under 42 U.S.C.A. §1983?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The plaintiff below respectively petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix ("App.") A-1. The opinion of the United States District Court For the Eastern District of New York is unreported and appears in App. A-17.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1989, App. A-1. Jurisdiction is conferred by 28 U.S.C. §1254 (1).

STATUTES INVOLVED

This case concerns the provisions of 28 U.S.C. §1346 (b); 39 Penal Law §250.25 (1) of the State of New York; 39 U.S.C.

§4057; U.S. Constitution, Fourth Amendment; The Constitution of the State of New York, Article 1 §12; and 42 U.S.C.A. §1983.

For the Court's convenience those statutes are set forth in App. A-21.

STATEMENT OF CASE

1. Background.

The facts in this case are substantially agreed upon by the parties.

On January 27, 1963, the plaintiff wrote a letter from New York City to a friend, a United States citizen who was temporarily visiting the Soviet Union. The letter was intercepted in a United States post office, opened and copies by the Central Intelligence Agency ("C.I.A.") as part of the mail-intercept program. This program had been in operation from

1953 to about the year 1973.[1] (There is no evidence that this has been discontinued.)

The plaintiff learned about this interception when he requested his file from the C.I.A. under the Freedom of Information and Privacy Act in 1987. This was the first knowledge he learned about the opening, reading and dissemination of his aforesaid letter. He promptly filed a claim under 28 U.S.C. §1346 (b) which was denied by the C.I.A. The instant action was commenced in May, 1988.

2. The Proceeding Below.

Defendants move to dismiss the action. Mr. Justice Weinstein dismissed the action on October 4, 1988, on statute

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[1] For a full description of the history of the mail opening projects, see Commission on CIA Activities Within the United States, Report to the President (1975) [hereinafter the "Rockefeller Report"]; also the Senate Select Committee To Study Governmental Operations With Respect to Intelligence Activities, Final Report (1976) [hereinafter the "Senate Report"].

of limitations grounds. On October 5, 1988, an order was signed by Mr. Justice Weinstein dismissing the complaint "for the reasons stated on the record...."[2]

On November 28, 1988, a Notice of Appeal was filed by the plaintiff from the order of Mr. Justice Weinstein to the United States Court of Appeals for the Second Circuit.

This Court disregarded Mr. Justice Weinstein's reason for dismissing the action, that is, the statute of limitations, and affirmed on the ground of jurisdiction. It held that "New York Courts have not recognized any common law action for the invasion of the right of privacy."

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[2] A - 55 "....motion for summary judgment is granted to the government on statute of limitations grounds."

REASONS WHY THE WRIT SHOULD ISSUE

The Court of Appeals Has Failed To Give Proper Legal Consideration To The Sanctity of First-Class Mail And The Inviolable Right of Privacy in The State of New York To Such Material.

A. The right of privacy with respect to the opening, reading and disseminating first-class mail of an unauthorized person, must be distinguished from all other conditions of privacy.

B. To justify the opening by unauthorized persons of first-class mail is in violation of the right of privacy under Federal and New York State Law.

The Rockefeller Report found that the opening and copying of sealed mail by the C.I.A. was illegal. (21). If we start from that finding, to which the C.I.A. did not deny, but promised to desist thereafter, we turn to the Penal Law of the State of New York.

39 Penal Law 250.00 reads:

"Offenses Against the Right To Privacy"

Further on in §250.25 (1) a person is found to be guilty if he or she tampers with private communications when:

> "1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or
>
> "2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; ..."

The basic law of the land is the Constitution of the United States which in Amendment IV secures people "in their... papers and effects against unreasonable searches and seizures."

The Constitution of the State of New York, Article 1, §12, has the same wording

as the Fourth Amendment to the United States Constitution.

39 U.S.C.A., §4057 prohibits the opening of first-class mail except "dead mail" or by a person "holding a search warrant". Neither of these conditions prevail in this case.

The sanctity of first-class mail would, according to the opinion of the Court of Appeals, be for naught unless the right of privacy is protected under the Laws of the State of New York. In this respect the Court erred when it failed to examine the Penal Law of the State of New York. Article 250, Book 39, Page 376, McKinney's Consolidated Laws of New York, and §250.25

In 34 Hillside Realty Corp. et. al. v. Norton, 101 N.Y.S. 2d 437, the Court held that conduct punishable under the Penal Law of the State of New York lays

the ground for civil action for damages. This proposition of law is further carried forward by 42 U.S.C.A. §1983.

CONCLUSION

It is evident from all the admonishments and prohibitions given to the protection of sealed mail that this situation differs considerably from advertising or picture taking without consent. Should the holding be sustained it would negate every protection given to first-class mail and no one would have their privacy protected.

The State of New York and the United States have by statute protected the privacy of first-class mail which together with the other constitutional provisions and statutes give this plaintiff a good cause of action.

A writ of certiorari should issue to review the decision of the united States Court of Appeals For the Second Circuit.

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 861 -- August Term 1988

(Submitted March 7, 1989 Decided SEP 6, 1989)

Docket No. 88-6283

LEO HURWITZ,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA and
THE CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

Before:

CARDAMONE and PRATT, Circuit Judges, and
LASKER*, District Judge.

Plaintiff Leo Hurwitz appeals from a final judgment of the United States

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* Hon. Morris E. Lasker, United States District Court Judge for the Southern District of New York, sitting by designation.

District Court for the Eastern District of New York (Weinstein, J.) entered on October 13, 1988, dismissing appellant's complaint and directing summary judgment in favor of the United States.

Affirmed.

STANLEY FAULKNER, New York, New York (Jeffrey Schwartz, of Counsel, New York, New York), filed a brief for Plaintiff-Appellant.

ANDREW MALONEY, United States Attorney, Eastern District of New York, Brooklyn, New York (Robert L. Begleiter, David M. Nocenti, Assistant United States Attorneys, Eastern District of New York, Brooklyn, New York, of counsel), filed a brief for Defendants-Appellees.

CARDAMONE, Circuit Judge:

Eleven years ago in Birnbaum v. United States, 588 F.2d 319 (2d Cir.

1978), we judged from a reading of past cases and from an assessment of modern legal thinking that New York's courts would recognize an action for an interference with "the right to be free from an unreasonable intrusion." Id. at 326. Time has proved that judgment wrong. New York's highest court has consistently reminded litigants that no so-called common law right of privacy exists in New York. See Freihofer v. Hearst Corp., 65 NY2d 135, 140 (1985); Arrington v. New York Times, 55 NY2d 433, 440 (1982), cert. denied, 459 U.S. 1146 (1983); Cohen v. Hallmark Cards, Inc., 45 NY2d 493, 497 n.2 (1978); Flores v. Mosler Safe Co., 7 NY2d 276, 280 (1959). The complaint in this case presents the same fact pattern as Birnbaum. This time we make no prophecy. Instead, we simply affirm, though on different grounds, the district court's dismissal of the complaint that alleges an

unreasonable intrusion with plaintiff's mail.

I

We summarize the facts that led to the commencement of this action. For approximately 20 years leading up to 1973, the U.S. Central Intelligence Agency (CIA) conducted a covert domestic operation in which its agents regularly intercepted, opened, reviewed, and copied mail sent to and from certain communist countries. The largest of these mail intercept programs was the so-called "East Coast" project, during which mail sent to and from the Soviet Union was inspected. See Report to the President by the Commission on CIA Activities within the United States (1975) (Rockefeller Report); see also Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess. 561-636 (1976)

(Senate Report). During the two decades that this activity continued the envelopes of several million pieces of mail were photocopied, and over 200,000 letters were opened and reviewed. Senate Report at 571.

Among that number was a letter sent by appellant Leo Hurwitz, who on January 27, 1963 wrote a letter to a person in the Soviet Union, and deposited it in the United States mail in New York City. Appellant did not know that his letter had been opened and copied until 1987 when, for unrelated reasons, he requested his file from the CIA under the Privacy Act of 1974, 5 U.S.C. § 552a (1982). In response to his request, appellant received in August 1987 a copy of his 1963 letter.

The following month Hurwitz filed a claim with the CIA, which was denied by letter dated March 9, 1988. On May 13, 1988 appellant commenced the instant

action in the United States District Court for the Eastern District of New York (Weinstein, J.) seeking monetary and injunctive relief under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), for the invasion of his privacy that occurred when the government opened the letter. The complaint further alleged that information gleaned from the letter was distributed to individuals within the CIA, that the agency continues to hold a copy of the letter, and that the government's actions were carried out without a judicial warrant or under any other lawful authority.

The government moved for summary judgment dismissing the complaint on the grounds that plaintiff had failed to state a claim upon which relief could be granted, and that the complaint was barred by the statute of limitations. At a hearing held on October 4, 1988 Judge

Weinstein ruled that plaintiff had stated a valid cause of action under New York law, but that the claims were barred by the two-year statute of limitations. As a consequence, he granted summary judgment in favor of the government.

In ruling from the bench, the district judge held that the two-year statute of limitations applicable under the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (1982), had expired. The court reasoned that though the claim accrued as of January 1963, the CIA's intentional concealment of its actions tolled the statute. The trial court then found that the toll was lifted as of January 1975 when CIA interference with United States mails became a matter of public knowledge as a result of the publication of the Rockefeller Report and because of widespread publicity given congressional

investigations of covert domestic CIA operations. See, e.g., Senate Report.

Rejecting appellant's contention that the statute of limitations did not begin to run until his actual discovery in 1987 that his mail had been opened 24 years earlier, the district judge held that as of 1975 plaintiff had at least constructive knowledge of interference with the mails which triggered the running of the statute of limitations, and that the applicable two-year limitations period expired in 1977. Plaintiff's suit filed 13 years later was therefore untimely. This appeal followed.

II

Although we agree with the result the district court reached, affirmance is not on statute of limitations grounds, but rather because plaintiff failed to state a cause of action recognized under New York law. Analysis begins with the Federal

Tort Claims Act. Under that Act the government has consented to be sued for money damages caused by

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982).

Thus, in order to maintain his federal cause of action, Hurwitz is required to establish that, under New York law, a private actor could be found liable in tort for the unauthorized opening of another's mail. Absent such a showing, the district court is without jurisdiction to entertain Hurwitz's claims. See United States v. Sherwood, 312 U.S. 584, 586 (1941) (As a sovereign, the United States is immune from suit without its consent, and the terms of that consent define a court's jurisdiction to entertain suit).

The question to be addressed therefore is whether the law of New York would confer a cause of action to right the wrongs complained of in this case.

Historically, New York courts have refused to recognize a generalized common law right to privacy. See Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556 (1902) ("An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence...."). In addition, the New York legislature has steadfastly refused to depart from the rule established in Roberson. Its only reaction to Roberson's denial of a cause of action seeking to vindicate privacy rights has been the statutory conferral of a cause of action for the unauthorized appropriation of a person's name or likeness for commercial use without that person's consent. See

N.Y. Civil Rights Law §§ 50, 51 (McKinney 1976 & Supp. 1989) (enacted in 1903 as a direct response to the Roberson holding).

The district judge relied upon our ruling in Birnbaum 588 F.2d 319, which held that the unauthorized opening of another's mail stated a cause of action under New York law sufficient to confer subject matter jurisdiction. In Birnbaum three plaintiffs sought damages under the Federal Tort Claims Act for intrusions into their privacy which occurred when the CIA intercepted and opened several of their letters destined for the Soviet Union. Hence, it is plain that the facts in Birnbaum are in all relevant respects indistinguishable from those present here. There, we affirmed a judgment against the United States on an "intrusion" theory and held that, though New York's highest court had not recently spoken on the subject, it was "hard to believe that the New York

Court of Appeals today would apply the rationale of the 1902 Roberson decision to bar an action based on intrusion upon privacy." Id. at 325.

Although it recognized that there was some doubt about the continuing validity of Birnbaum, the district court noted that the New York Court of Appeals had never expressly disapproved of it and stated that it was "going to stay with the Second Circuit until they indicate otherwise on [this] point." In light of New York decisions handed down since Birnbaum, we are compelled to conclude that New York's highest court has not recognized a cause of action for intrusion upon the privacy of another. More specifically, other than the right of privacy recognized in Civil Rights Law §§ 50 and 51 New York Courts have not recognized any common law action for invasion of the right of privacy. Thus the unauthorized opening and copying

of another's mail does not give rise to an invasion of privacy claim in New York, whether it is styled "intrusion" or otherwise.

In Freihofer, for example, an individual sought to recover damages for the invasion of his privacy that occurred when a newspaper procured and published portions of confidential documents submitted in his matrimonial action. The published documents were statutorily protected from disclosure, see N.Y. Domestic Relations Law § 235 (McKinney 1986), and plaintiff sought, inter alia, to assert a cause of action sounding in tort for the invasion of his right to privacy which was allegedly infringed when the newspaper knowingly published excerpts from and summaries of the confidential material. In dismissing plaintiff's action, the court stated

> We have in the past recognized that, in this State, there is no common-law right of privacy and the only available remedy is that created by Civil Rights Law §§ 50 and 51. In these cases, we took cognizance of the limited scope of the statute as granting protection only to the extent of affording a remedy for commercial exploitation of an individual's name, portrait or picture, without written consent.

65 NY2d at 140.

Thus, Freihofer expressly rejected the position urged by appellant. Several cases decided in New York's intermediate appellate courts since Birnbaum also support the dismissal of Hurwitz's claims. The Appellate Division, Fourth Department, expressly referring to Birnbaum, stated that it did not "believe that an action for breach of the right of privacy may be maintained despite some current predictions to the contrary." MacDonald v. Clinger, 84 AD2d 482, 484 (1982); see also Simpson v. New York City Transit Auth., 112 AD2d 89, 90 ("New York does not recognize any common law right to privacy.

Whatever protection is afforded a person's privacy comes solely by virtue of statute . . . ."), aff'd mem., 66 NY2d 1010 (1985); Novel v. Beacon Operating Corp., 86 AD2d 602, 602 (1982) ("In New York, recovery for violation of one's right to privacy is provided for in the Civil Rights Law. No common-law right to privacy exists.").

Finally, in Mack v. United States, 814 F.2d 120, 123 (2d Cir. 1987), we acknowledged that the predictions made in Birnbaum were inaccurate. See also Allen v. National Video, Inc., 610 F. Supp. 612, 620 (S.D.N.Y. 1985) ("Although most states . . . have recognized at least four different categories of invasion of privacy, New York has never recognized the right to privacy as part of its common law."). Consequently, as there is a failure to state a cause of action there

is no need to reach or rule on the statute of limitations holding.

III

Because New York does not recognize a cause of action for intrusion arising out of the opening of a person's mail without his consent the requisite jurisdiction under § 1346(b) of the Federal Tort Claims Act is lacking. Accordingly, the judgment dismissing the complaint is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LEO HURWITZ,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA and THE CENTRAL INTELLIGENCE AGENCY,

Defendants.

----------X

ORDER

Civil Action No. CV-88-1509

(Weinstein, J.)

This case having come before this Court on defendants' motion to dismiss or, in the alternative, for judgment on the pleadings, and having considered the pleadings and all papers submitted in support of and in opposition to defendant's motion, and having considered the arguments made at the hearing held on October 4, 1988, it is hereby

ORDERED that plaintiff's complaint shall be and hereby is dismissed for the

reasons stated on the record, and it is further

ORDERED that the Clerk of the Court shall enter judgment on the pleadings for defendants pursuant to Rule 12(c) and 56 of the Federal Rules of Civil Procedure.

Dated: Brooklyn, New York
October 5, 1988

/s/ Jack B. Weinstein
HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

LEO HURWITZ, JUDGMENT

Plaintiff, CV 88-1509 (JBW)

-against-

THE UNITED STATES OF AMERICA and THE CENTRAL INTELLIGENCE AGENCY,

Defendants.

----------X

An order of Honorable Jack B. Weinstein, United States District Judge, having been filed on October 5, 1988, dismissing plaintiff's complaint for the reasons stated in the record and directing that judgment be entered on the pleadings for defendants pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure, it is

ORDERED and ADJUDGED that plaintiff take nothing of defendants; that plaintiff's complaint is dismissed for the

reasons stated in the record; and that judgment is hereby entered on the pleadings for the defendants pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure.

Dated: Brooklyn, New York
October 7, 1988

/s/ Robert C. Heineman
ROBERT C. HEINEMAN
Clerk of Court

ARTICLE 250 - OFFENSES AGAINST THE RIGHT TO PRIVACY

§ 250.25 Tampering with private communications

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; or

§ 12. [Security against unreasonable searches, seizures and interceptions]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the

particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

§ 4057. Opening first class mail

Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department.

Pub.L. 86-682, Sept. 2, 1960, 74 Stat. 657.

UNITED STATES CONSTITUTION

AMENDMENT IV-SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§ 1346. United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

198 Misc. 302

34 HILLSIDE REALTY CORP. et al. v. NORTON et al. NORTON et al. v. 34 HILLSIDE REALTY CORP. et al. EPSTEIN v. VIRPETIA REALTY CO., Inc. et al.

City Court of New York, Special Term, Bronx County. Apr. 17, 1950

Action by 34 Hillside Realty Corporation, Virpetia Realty Company, Inc., and Emma V. Santini, against Walter Norton, and others, for damage for injury to reputation and for special damage in being required to pay legal fees. The action was consolidated with triple damage actions under the federal rent laws by Walter Norton, and others, against 34 Hillside Realty Corporation, and others, and by Jacob Epstein against Virpetia Realty Co., Inc., and others. In the first action, some of the defendants filed a motion to dismiss the complaint. The City Court of the City of New York, County of Bronx, William S. Evans, J., held that an arrangement by which tenants gave bonus

to superintendent to rent apartments to tenants in preference to applicants not giving bonus and by which bonus was kept secret from corporate landlords entering into rental contracts with tenants was in violation of penal law and constituted a civil tort for which corporate landlords could maintain action against tenants to recover damage to which landlords would be subjected in triple damage suit under federal rent laws, but that the president of the corporate landlords suffered no such injury to reputation or special damage in being required to pay legal fees as would enable president to maintain action against tenants.

Motion granted as to individual plaintiff and denied as to corporate plaintiffs.

Rapaport Bros., New York City, for plaintiffs 34 Hillside Realty and others.

Barney Rosenstein, New York City, for defendants Norton and others.

David Davidoff, New York City, for defendant Anthony Mangone.

EVANS, Justice.

The plaintiffs are two corporate landlords and one individual, the president of each corporate plaintiff. The defendants are the Superintendent of two apartment dwellings, owned by the corporate landlords, and four tenants of the two buildings.

This is a motion by the four tenants, in which the Superintendent does not join, to dismiss the complaint, under Rule 106, Rules of Civil Practice.

The important allegations of the complaint say that the tenants arranged

with the Superintendent, for a gratuity, in plainer words, a bribe, to rent dwelling quarters in the two buildings to them in preference to other legitimate applicants for dwelling quarters, who did not give the Superintendent a bonus, gift, or gratuity, and that these defendants contrived to keep the bonus arrangement a secret from the plaintiffs, so that they were in complete ignorance thereof, and therefore, innocently entered into rental contracts with the tenants. That plaintiffs neither shared in the gratuities, authorized, acquiesced in or condoned the conduct of the tenants and superintendent in any manner. These allegations tend to show a violation by defendants of the State Penal Law. Sections 439, 580(1), 965.

There follows an allegation of special damage, by the corporate plaintiffs, in that, as a consequence,

these plaintiffs were obliged to incur "substantial expenses for legal fees". The individual plaintiff also claims these damages and, in addition thereto, damage for injury to reputation.

[1] We have then a complaint which alleges an arrangement to violate the State Penal Law on the part of the tenants, and conduct on their part, which carried out the unlawful arrangement. Since such conduct is punishable under the penal law, there is no reason why it should not be actionable civilly, if damage could reasonably flow from such conduct. The wrong alleged against the tenants could conceivably cause damage to the corporate plaintiffs, in that they would be subjected to a suit under federal rent law, with the necessity of expending at least legal fees in its defense.

[2] In entering into these rental arrangements with the tenants, under the

circumstances, it follows that the corporate plaintiffs might be subjected to a triple damage suit, under the federal rent laws. In such a suit, (which the complaint does not allege to be pending, but which is in fact pending in this court and has been consolidated with this very lawsuit), the corporate plaintiffs might be held liable, even though innocent, because the wrongful conduct of the superintendent, even though unknown to them, could be attributable to them, since the Superintendent was their agent, and what he did might be deemed to have been done in the course of his employment.

[3] I do not think it is an answer to the complaint to say that these tenants, under the federal rent laws, have civil immunity from the wrong they have committed, because they are not in pari delicto with the Superintendent, in such a suit, Zwang v. A. & P. Food Stores, 181

Misc. 375, 46 N.Y.S.2d 747. It is because of this civil immunity that they are able to prosecute a triple damage suit, in spite of the wrong they committed.

[4] But the federal rent laws have not immunized the tenants from a violation of State penal laws. Violation of a penal statute may also constitute a civil tort, and if damage may reasonable flow therefrom, there is no reason why it should not be actionable.

[5,6] So far as the individual plaintiff is concerned, the allegation that she suffered special damage in being required to pay legal fees, and general damage in injury to reputation, is insufficient, because it is utterly inconceivable how any such damage could possibly flow from the wrong alleged. The individual plaintiff is not in the same position as the corporate plaintiffs, in being civilly responsible for the conduct

of the superintendent, under the federal rent laws. So that the reasoning that would save the complaint as to the corporate plaintiffs is not applicable to the individual plaintiff. Counsel suggests that damage to reputation would follow from the wrong, because she has been charged with and is awaiting trial for violation of section 965, Penal Law. But that is not alleged in the complaint, and even if it were alleged, the action would be premature. The injury to reputation results from the penal prosecution, not from the wrong alleged in the complaint. If the prosecution results in the individual plaintiff's conviction, she will have no cause of action for injury to reputation. If she is acquitted, she may have a cause of action for malicious prosecution and consequent injury to her reputation. So that the cause of action for injury to reputation

will not arise, until the individual plaintiff is acquitted, and, at this time, is wholly premature.

The motion to dismiss the complaint is granted as to the individual plaintiff, and denied as to the corporate plaintiffs.

No. 89-690

In the Supreme Court of the United States

OCTOBER TERM, 1989

LEO HURWITZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
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QUESTION PRESENTED

The Central Intelligence Agency (CIA) opened and read a letter petitioner mailed from New York City to the Soviet Union in 1963. Petitioner filed suit against the United States in May 1988 under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages based on an alleged invasion of privacy that occurred when the CIA opened his letter. The question presented is whether the court of appeals correctly upheld dismissal of petitioner's suit on the ground that New York does not recognize a common law action for invasion of privacy.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-690

LEO HURWITZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 884 F.2d 684. The orders of the district court (Pet. App. A17-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. The petition for a writ of certiorari was filed on October 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 27, 1963, petitioner mailed a letter from New York City to a person in the Soviet Union. Without his knowledge, the letter was opened and copied by the Central Intelligence Agency as part of a program in which agents intercepted and opened mail sent to certain communist countries. Although the mail-intercept program was revealed to the public during the mid-1970s in the course of the investigations by the "Rockefeller Commission" and congressional committees,[1] petitioner alleges that he did not learn that his letter had been intercepted until he received a response from the CIA in August of 1987 to an unrelated "request for file" made pursuant to the Privacy Act of 1974, 5 U.S.C. 552a. Pet. App. A4-A5.

In September 1987, petitioner filed a claim with the CIA. The claim was denied by letter of March 9, 1988, and on May 13, 1988, petitioner sued the United States under the Federal Tort Claims Act (FTCA) in the Eastern District of New York, alleging that the opening and copying of the letter was an invasion of privacy. Pet. App. A5-A6.

On October 7, 1988, the district court dismissed the complaint and granted summary judgment to the United States on the ground that the action was barred by the statute of limitations. Pet. App. A17-A20. The court held that, as of 1975, petitioner had at least constructive knowledge of interference with the mails that triggered the running of the statute

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[1] See *Report to the President by the Commission on CIA Activities within the United States* (1975); see also *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess. Bk. III, at 561-636 (1976).

of limitations. Since the applicable two-year limitations period expired in 1977, petitioner's suit was untimely. See Pet. App. A8.

Petitioner appealed, and the Second Circuit affirmed. The court first noted that since the FTCA is a waiver of sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), petitioner was required to establish that New York law would recognize a cause of action in tort for the unauthorized opening of the mail of another. Pet. App. A9. The court then observed that in *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), a case presenting "the same fact pattern" (Pet. App. A3) as petitioner's, it had concluded that New York would likely recognize a "right to be free from an unreasonable intrusion" action. 558 F.2d at 326. See Pet. App. A3. But the court was convinced by the uniform intervening New York decisional law that its *Birnbaum* surmise had been wrong. The court was "compelled to conclude that New York's highest court has not recognized a cause of action for intrusion upon the privacy of another." Pet. App. 12.

Because New York law would not recognize petitioner's cause of action, the court of appeals held that petitioner's claim was not cognizable under the FTCA. Pet. App. A16. Accordingly, the court affirmed the judgment dismissing the complaint without reaching the statute of limitations issue decided by the district court.[2]

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[2] In the *Birnbaum* case, which was decided in 1978, the Second Circuit had held that "the Statute of Limitations has run by now on all unfiled mail opening claims for relief." 588 F.2d at 335 n.31.

ARGUMENT

The court of appeals' decision, which turns solely on a question of state law, raises no issue of national significance. The decision is correct, and further review is not warranted.

1. In *Birnbaum* v. *United States*, *supra*, the Second Circuit predicted that New York would recognize a cause of action for invasion of privacy for the unauthorized opening of mail. Since then, twenty years of decisions by the New York courts have convinced the court of appeals that its assessment was wrong.

Birnbaum involved consolidated suits under the FTCA by individuals whose mail had been opened and copied under the same CIA intercept program that led to the opening of petitioner's letter. The *Birnbaum* court noted that the leading State case, *Roberson* v. *Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), had rejected the contention that New York law recognized a right of action for invasion of privacy. Despite this precedent, the court of appeals reasoned that since *Roberson*, the widening acceptance of tort actions for violations of privacy rights made it "hard to believe that the New York Court of Appeals today would apply the rationale of the 1902 *Roberson* decision to bar an action based on intrusion upon privacy." 588 F.2d at 325. The court stated that its "assessment of current legal thinking" warranted the judgment that New York "would recognize an action for violation of the right to be free from unreasonable intrusion" (*id.* at 326), and that the *Birnbaum* plaintiffs therefore had stated a claim under the FTCA.

2. As the court below observed, "[t]ime has proved that judgment wrong. New York's highest

court has consistently reminded litigants that no so-called common law right of privacy exists in New York." Pet. App. A3. An unbroken line of precedent supports this observation. See *Freihofer* v. *Hearst Corp.*, 65 N.Y.2d 135, 140, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 739 (1985); *Arrington* v. *New York Times Co.*, 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982), cert. denied, 459 U.S. 1146 (1983); *Cohen* v. *Hallmark Cards, Inc.*, 45 N.Y.2d 493, 497 n.2, 382 N.E.2d 1145, 1146 n.2, 410 N.Y.S.2d 282, 284 n.2 (1978); *Flores* v. *Mosler Safe Co.*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 854, 196 N.Y.S.2d 975, 977 (1959).

Because "the State's highest court is the best authority on its own law" (*Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967)), and that court has repeatedly rejected the theory on which petitioner's case rests, the court of appeals properly concluded that petitioner has no claim under the FTCA for the government's purported invasion of his privacy.[3]

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[3] In the "Questions Presented" portion of the petition, it is suggested that the government may be liable "for the deprivation of plaintiff's right to the secrecy and security of his first-class mail under 42 U.S.C.A. § 1983." But that provision applies only to actions taken under color of the law of "any State or Territory or the District of Columbia," and thus has no application to the facts of this case. Insofar as petitioner may be claiming a right of action directly under the Constitution analogous to that recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), he did not raise that issue in the court below. As he asserted in his brief in the court of appeals, "[petitioner] commenced this action under the Federal Tort Claims Act." C.A. Br. 2. Moreover, petitioner has named no individual defendants in this action.

Additionally, petitioner argues (Pet. 6-7) that a tort action may be predicated on Section 250.25 of the New York Penal

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1989

Code (McKinney 1989), which makes it a crime to open, read, or divulge the contents of a sealed letter without the sender's or recipient's permission. This argument too was not raised in or addressed by the court of appeals. Moreover, as the court of appeals noted, the "only available remedy" for invasion of privacy in New York is found in Civil Rights Law Sections 50 and 51 (McKinney 1976 & Supp. 1990). Pet. App. A14 (quoting *Freihofer*, 65 N.Y.2d at 140, 480 N.E.2d at 349, 490 N.Y.S.2d at 735). These provisions protect only against unauthorized commercial exploitation of one's name or photograph and thus do not protect against the invasion of privacy alleged here. The single case cited by petitioner in support of his argument, *34 Hillside Realty Corp.* v. *Norton*, 198 Misc. 302, 101 N.Y.S.2d 437 (N.Y. City Ct. 1950) (discussed at Pet. 8-9), is not a privacy case; it involved the implication of a private right of action by a landlord against a tenant for violating a penal statute prohibiting bribery to obtain a rental apartment.

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No. 89-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEO HURWITZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA and
THE CENTRAL INTELLIGENCE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

RULE 17 CONSIDERATIONS WARRANT REVIEW BY THIS COURT

This case deserves consideration by this Court under Rule 17. There are special and important reasons. Until this Court decides this question of the opening of first-class mail in the State of New York and elsewhere such mail may be opened with impunity by any government agency or other and the dissemination of its contents.

II.

ISSUE OF NATIONAL IMPORTANCE IS RAISED

Respondents assert in its argument that certiorari should be denied because the decision of the Court of Appeals "... raises no issue of national importance." (p. 4) This pronouncement reduces the right of privacy of one's

first-class mail to a nullity. This is a complete denial of the Fourth Amendment, the Penal Law of the State of New York and the opening of mail.

III.

RESPONDENTS' ARGUMENT WOULD NULLIFY STATUTES OF THE STATE OF NEW YORK, OF THE UNITED STATES CODE, ARTICLE 1, §12 OF THE CONSTITUTION OF THE STATE OF NEW YORK AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The argument of the respondents would nullify (A 21-25):

1. 39 Penal Law 250.00 of the State of New York.

2. 39 Penal Law 250.25 of the State of New York.

3. 39 U.S.C.A. 4057.

4. Fourth Amendment to the U.S. Constitution.

5. Article 1, §12 of the Constitution of the State of New York.

6. 42 U.S.C.A. 1983.

IV.

THE PRIVACY OF FIRST-CLASS MAIL IS INVIOLABLE AND PROTECTED BY THE PENAL STATUTE OF THE STATE OF NEW YORK

The Court of Appeals and the respondents rely heavily upon Roberson v. Rochester Folding Box Co., 171 N.Y. 538. This reliance is not only weak, but absolutely misses the statutory right of privacy as regards first-class mail. The privacy of mail is so inviolable that penal statutes have been enacted in New York to protect it from invasion.

The fact that the Penal Law of the State of New York and its Constitution impose penalties for the opening of first-class mail and restrictions on unlawful search and seizure are evident enough that the right of privacy insofar as first-class mail is concerned has a high priority.

The case is a challenge to the respondents' total disregard and avoidance of the constitutional right of an individual not to have his privacy invaded.

The respondents deprecate 34 Hillside Realty Corp. v. Norton, 198 Misc. 302, 101 N.Y.S. 2d 437 (1950) cited by petitioner as not a case of privacy. This case held that an action for damages, as in this case, follows when the conduct is criminally punishable. Interestingly, the respondents fail to come forward with any case where this Court has been asked to decide upon the non-right of the privacy of the mail. The only recourse to privacy in New York State, as argued by the respondents, is "picture taking" without consent.

V.

THE CASE IS NOT BARRED BY
THE STATUTE OF LIMITATIONS

Insofar as the statute of limitations is concerned and which the respondents and the District Court, Judge Weinstein, relied is misplaced. Although this is not an issue in this petition for a writ of certiorari, since the lower court disregarded this and affirmed the order for summary judgment on jurisdictional grounds, it should nevertheless be noted. In the respondent's Brief in the Court of Appeals the public disclosure of the wrongdoing of the CIA in The New York Times of December 22, 1974, is relied upon. (Footnote p. 30.) Petitioner's Reply Brief documents this "disclosure" by appending a copy of that issue of The New York Times. In that news item of 9 columns citing the illegal acts of

the CIA of approximately 8550 words only 6 words mention the surveillance of mail. Upon this quicksand of reasoning the respondents contend that the statute of limitations has run against petitioner.

A further inference can be drawn from the respondents' contention and that is that one should not trust our government agencies. From this every citizen every day should be able to examine any files of information gathered about himself or herself in order not to have an action barred by the statute of limitations. In this case petitioner had no reason to suspect that an innocuous letter mailed to a colleague temporarily in the Soviet Union would be opened, read and circulated by an agency of our government in a "place" owned and operated by the

government and staffed by government employees.

VI.

MONETARY RELIEF CAN FOLLOW THE VIOLATION OF A PENAL STATUTE

The argument of the respondents that Section 250.25 of the New York Penal Code (McKinney 1989) was not raised in or addressed by the Court of Appeals is not entirely accurate. The complaint distinctly refers to this section of the New York Penal Law (A-5). With respect to the learned judges below whether the law of New York confers a cause of action to right the wrongs complained of in this case, it does. A cause of action for monetary relief can follow the violation of a penal statute of the State of New York, 34 Hillside Realty Corp., et al v. Norton, 101 N.Y.S. 2d 437.

CONCLUSION

For all of the foregoing reasons and those set forth in the Petition For A Writ of Certiorari, petitioner respectfully submits that his petition be granted.

Respectfully submitted,

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